LITIGATION TIPS & TRAPS

I have been practising law for many decades now, and for most of that time, I have been involved in litigation. For those of you who are not really sure what litigation is, it is the process of resolving disputes.

In reality, it means issuing proceedings, going through a lot of steps preparing for court, and then, if the matter has not been settled during the lengthy and expensive litigation process, going to court and hoping the decision is the right one or, more particularly, the one in your favour.

As a result of practising in the area for many years, there are a few tips and traps that I have come across on a regular basis that I would like to share with you.

1. ***Something in writing is better than nothing in writing***. Quite often I am instructed that there was an agreement, a variation, an admission, etc. from the other side which would help my client's case. Almost as often, that consists of "Jack rang me and said" or "Jane told Bill who told me that..." Interesting, but useless.

   What would be useful is an email from Jack or Jane, or a text message, or even a diary note of a conversation. Courts tend to believe a written document, in the absence of anything to contradict it.

2. ***Self-serving documents are better than no documents***. If Jack or Jane will not send you an email or text, send one to them. "Hi Jack – I confirm our conversation we just had that you will pay the money in a week's time". That puts the onus on Jack to reply. If he did not say it, the Court will expect him to reply and deny either the conversation or the contents of it. If he does not do so, you are likely to be believed.

   The flip side of this is that, if somebody sends you a text or email or letter containing matters which are clearly incorrect or incomplete, do not ignore them. Simply saying later that you did not respond because you did not agree with the contents is not viewed favourably by the courts. If matters are clearly incorrect, the courts expect you to say so.

3. ***Cost/benefit analysis. Litigation is expensive***. For most of us, getting involved in Supreme Court litigation is likely to wipe out a lot of your life savings. Even proceedings in the Magistrates' Court or VCAT are expensive, if they run to a final hearing. Some people bring or defend proceedings out of principle. It is surprising how often principles are forgotten when the legal fees mount up, you have spent $250,000, you are still to get to court, and the case is not getting any stronger.

   The litigation I practise is called "commercial litigation", and I think that it's a fair description. The disputes are by and large about money, or matters that can be reduced to or compensated by money. Even though they may involve family or other relationships, it usually comes down to money.

   If a dispute is ultimately about money, or that is the likely remedy, then at all times seek the advice of your solicitor as to the benefits of proceeding or not proceeding - sometimes it is better to cut your losses and not throw good money after bad.

4. ***Get a sensible solicitor***. Most solicitors are sensible and try to resolve matters in a way beneficial to you, the client. Some, on the other hand, have watched too many American law shows, and think that the best way to conduct litigation is the scorched earth way. It is not – it may give you a warm inner glow, but it will cost you a lot more money. You will know pretty quickly if your solicitor is sensible or not, or ask a friend or colleague to recommend someone.

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5. ***Winning a case does not necessarily bring resolution***. Going to court to seek justification of your actions, or vilification of another's actions normally ends in tears. Even if you win, it will have cost you a lot, in time, money, stress and loss of opportunities and the courts will not necessarily go out of their way to bad mouth the other side or praise you. There is always the possibility that you will lose, which might in fact justify the other side's actions – by the way, going back to 4 above, if your solicitor says you are certain to win, change solicitors. Nothing is certain in the court system.

6. ***Cash is not king***. I have seen many cases involving claims for loss of earnings, etc. where the financials did not back up the claim, on the basis that most of the money going through the business was cash. If you have not paid tax on it, you will not be able to claim it. Courts are obligated to report tax fraud to the ATO, and they do so regularly. If you have been hiding cash for many years, then you have received a benefit by doing so – but the courts will not condone your actions. They will report you and the ATO will prosecute you.

7. ***There is such a thing as the litigation merry-go-round***. Once started, you cannot automatically get off. A recent case in South Australia illustrated that. A Trustee of a bankrupt brought or funded two actions for a total of $25,000 – it ended costing them well over $1 million in legal costs. It is not always easy to get off once the process is started – even if you manage to do so, it will probably be at a cost to you. Don't start litigation for the fun of it.

8. ***Consider early mediation***. Virtually all litigation in Victoria will be the subject of mediation at some stage, and the majority of cases settle at mediation. The reason for that is that mediation is an opportunity to air your grievances (which you might not get to do in court), consider the other side's position and come to a compromise to resolve the matter, which:-

   - provides certainty
   - reduces costs
   - reduces stress
   - lets you get on to earning money elsewhere.

   Early mediation (as soon as both sides have a reasonable understanding of the other side's case) makes a matter easier to resolve because

   - you have hopefully not spent too much money in costs getting to that stage, which means the distance between the two positions is less
   - you are not "locked into" a position, which you must defend at all costs
   - it is an indication that both sides have sensible solicitors – the importance of that cannot be underestimated.

   Mediation involves compromise – if a matter is to resolve, all parties must compromise to a greater or lesser extent. If there is no compromise at all, the matter will not settle.

   Why should you compromise? See 1-7 above! Also, litigation is expensive. You must take a commercial approach. The less money that you have to pay lawyers the better for you.

   Sometimes, however, no matter how much you take into account the comments above, there is no real choice other than to issue and proceed. There are a lot of people out there that are as aware of these matters as I am, and they will try and bluff you into surrender. In that situation, call their bluff and proceed. At some stage in the litigation, the matters above will come into play, but always bear in mind they apply to both sides, not just you. If a reasonable opportunity to settle is available, take it. If it does not, then proceed – in many cases there is simply no choice.

I hope these few comments have been useful – they have been honed by years of seeing the good and the bad of litigation.

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